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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1190

FRANKLIN S. KINCHELOE, JR., M.C.,
Petitioner,

v.

BOARD OF MEDICAL EXAMINERS OF THE STATE OF NORTH CAROLINA,
Respondent.

BRIEF OF RESPONDENT THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF NORTH CAROLINA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Supreme Court of North Carolina in this case now before this Court is reported in 272 N.C. 116, ... and is reprinted in the Appendix to Petitioner's brief.

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on December 12, 1967. The jurisdiction of this

Court is invoked under 28 U. S. Code, Section 1257(3). The time for Petitioner filing his petition was extended to and including March 2, 1968.

QUESTION PRESENTED

DOES THE PETITION PRESENT ANY QUESTION ARISING UNDER THE CONSTITUTION OF THE UNITED STATES WARRANTING REVIEW BY THIS COURT OF THE DECISION OF THE NORTH CAROLINA SUPREME COURT, WHICH FOUND THAT PETITIONER HAD KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHT TO BE REPRESENTED BY COUNSEL AT THE HEARING BEFORE RESPONDENT BOARD AND THAT THE BOARD'S DECISION REVOKING PETITIONER'S LICENSE TO PRACTICE MEDICINE WAS IN ACCORD WITH THE APPLICABLE STATUTES OF NORTH CAROLINA?

STATUTORY PROVISIONS INVOLVED

This case involves the application of North Carolina General Statutes, Chapter 90, Article 1, which are quoted in the appendix to the brief, summarized as follows:

> "G. S. 90-14 provides that the Board of Medical Examiners may revoke a physician's license, "when, after due notice and hearing, it shall find (he) . . . has been guilty of . . . any unprofessional or dishonorable conduct unworthy of, and affecting, the practice of his

profession. . .". It further provides that its findings and actions shall be subject to review upon appeal to the Superior Court.

G. S. 90-14.10 says that upon the review, the case shall be heard by the judge without a jury, upon the record; that "(t)he court may affirm the decision of the Board or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the accused physician have been prejudiced because the findings or decisions of the Board are in violation of substantive or procedural law, or are not supported by competent, material and substantial evidence admissible under this article, or are arbitrary or capricious."

G. S. 90-14.11 authorizes any party, including the Board, to appeal to the Supreme Court from the decision of the Superior Court."

STATEMENT OF FACTS

Petitioner in this court was referred to in the opinion of the Supreme Court of North Carolina as Respondent and was referred to in the Order of the Superior Court of North Carolina as "Dr. Kincheloe".

Petitioner seeks a writ of certiorari from this court for a review of the decision of the Supreme Court of North Carolina, which is reprinted in the appendix to Petitioner's brief filed herein, upholding the order of the Respondent Board of Medical Examiners of the State of North Carolina revoking Petitioner's license to practice medicine. This opinion clearly summarizes the rather lengthy record

of the hearing, and completely and sufficiently answers each of petitioner's complaints concerning the hearing. For convenience, we shall repeat and amplify this statement of facts here.

This case was commenced by respondent Board with the issuance and service upon Petitioner of a "Notice of Charges and Accusations", and of a hearing thereon, to be held on January 6, 1967, as set forth in the record of the case in the Supreme Court of North Carolina, a copy of which is filed with this court, pages 1-4, and as provided by the General Statutes of North Carolina regulating the practice of medicine, which are reprinted as an appendix to this brief. The charges against petitioner related to his alleged mistreatment of Deborah Jean Edwards (Stanley), the petitioner's patient, on August 17, 1966. These charges were as follows:

"(a) You directed and caused Deborah Jean Edwards to enter a room in the rear of your offices, excluded her mother from the room, and you entered the room and closed the door.

"(b) You then directed and caused Deborah Jean Edwards to remove all of her clothing in your presence without any medical reason or necessity.

"(c) You examined various parts of the nude body of Deborah Jean Edwards in a room, the door or doors to which were closed, and in which no other person was present.

"(d) You administered to Deborah Jean Edwards a drug by hypodermic injection which rendered her unconscious for an appreciable period of time without any medical reason or necessity.

"(e) While Deborah Jean Edwards was unconscious and insensible to her surroundings and while no other person was present and while she was unclothed you examined, observed, touched and otherwise came in contact with her body, all without medical reason or necessity.

"(f) You attempted to kiss Deborah Jean Edwards.

"(g) You attempted to enduce Deborah Jean Edwards to permit you to embrace her.

"(h) You placed your arms around Deborah Jean Edwards while she was unclothed without any medical cause or necessity.

"(i) You penetrated the vaginal cavity which caused a laceration at the entrance to the vagina of Deborah Jean Edwards without medical reason or necessity and without the presence of any other person.

"(j) By your remarks and actions in your dealings and attendance of Deborah Jean Edwards, you displayed a lustful, lascivious and unprofessional attitude and demeanor, and you did take unprofessional liberties with her.

"(k) You engaged in sexual intercourse with Deborah Jean Edwards.

"2. In your treatment of Deborah Jean Edwards on August 17, 1966 and in connection therewith, you were guilty of unprofessional and dishonorable conduct unworthy of and affectng your profession, and grounds exist for the revocation of your license to practice medicine heretofore issued by this Board."

The notice served upon respondent further provided and included the following:

"You are further given notice that a hearing will be held concerning the above charges and accusations before the Board of Medical Examiners of the State of North Carolina at its meeting to be held at the Mid Pines Hotel, Moore County, N. C. on January 6, 1967 at 2:00 p.m. o'clock at which time you will be permitted to be heard, to cross examine witnesses and to present evidence on your own behalf if you so desire, either personally or through counsel, and that following said hearing the Board will make such findings and take such action as the evidence may warrant and justify, with respect to the suspension or revocation of your license to practice medicine heretofore issued by this Board."

Following a hearing before the respondent Board on January 6, 1966, the Board found Dr. Kincheloe guilty of unprofessional and dishonorable conduct unworthy of and affecting his profession and ordered his license to practice medicine revoked.

The petitioner appealed to the Superior Court of Wake County for a review of the findings and order of the Board, pursuant to the applicable North Carolina statute. When the Petition for Review was first heard in the Superior Court, petitioner moved that the case be remanded to the respondent Board for more specific findings of fact concerning or a dismissal of the specific charges set forth in paragraphs 1-a through 1-k of the Notice of Charges and Accusations. Thereafter, the matter was again considered by the respondent Board upon a review of the entire stenographic record of January 6, 1967, and by unanimous vote of the Board the petitioner was found guilty of each of the charges set forth in paragraphs 1-a through 1-k of the Notice, and the revocation of petitioner's

license to practice was affirmed and reiterated. Petitioner thereupon again appealed the Superior Court to review and reverse the findings and order of the respondent Board, upon substantially the same grounds petitioner had previously set forth in his first appeal.

The cause was again heard in the Superior Court before Honorable Lacy H. Thornburg, Judge Presiding, in Wake County, on the 20th of September, 1967, upon petitioner's appeal.

As provided by the applicable statute set forth in the appendix hereto, the Superior Court hearing was held upon the stenographic record of the evidence presented before the Board, and the additional testimony of the petitioner which he was permitted to give orally before the court, which appears in the record, pages 115-124.

The evidence in support of the charges and accusations introduced at the hearing before the respondent Board on January 6, 1967 was summarized in the opinion of the North Carolina Supreme Court as follows:

> "Summarized, except where quoted the evidence against the respondent before the Board of Medical Examiners tended to show that on 16 August 1966 Mrs. Myrtle Edwards took her sixteen-year-old daughter Deborah Jean Edwards to Dr. Kincheloe's office for an examination and attention. After an hour or so he took Deborah and her mother into his private office where the mother told the doctor that Deborah had been feeling bad, that she though her kidneys were bad and that she wanted the doctor to

check them. Deborah had been struck by a mirror of a truck the day before and had been suffering from a headache since then.

Dr. Kincheloe took Deborah into another room, leaving her mother in his office. He kept her there from about 3:30 p.m. until after 5:00 p.m. When Deborah came out she was holding onto the wall, steadying herself, staggering and was dizzy. Mrs. Edwards and Deborah then went to the home of another daughter, and later Deborah told two older sisters what had occurred while she was with Dr. Kincheloe. The sisters told the mother, and the next morning Deborah was examined by Dr. Leonard S. Woodall who testified that he made a pelvic examination to see if Deborah had had intercourse; that he found sperm and a laceration of the hymenal, and that in his opinion she had had intercourse.

Deborah testified that she had been hit by the mirror of a truck and received a blow on her right temple; that she had some bad headaches that night and the next day, and also that she had been in bed sick for about a week and "mother thought it was my kidneys." Upon being admitted to Dr. Kincheloe's private office, Mrs. Edwards told him that she wanted him to examine Deborah's head because the truck had hit her and to check her kidneys. The child was then taken to another room, and Dr. Kincheloe asked her to go into the bathroom and give him a specimen of her urine, which she did. The doctor told her to put it on the table, and it was still in the same place when she left the room over an hour later.

She then testified as to what further occurred, except for a period of unconsciousness caused by the injection of some drug in her arm. No good purpose would be served by relating the details of the hour-long treatment during which no nurse or other person was present.

She said she was required to completely disrobe, and after a more than complete examination was given an injection that rendered her unconscious. Her evidence offered a substantial base for the findings of the Board which were affirmed by the Court.

She was dizzy and had to hold onto the wall or chair to keep from falling as she left the office. When she got to her sister's house she told her mother that the doctor had given her a shot and she passed out and I was real dizzy and sleepy like I could sleep for three or four days. I was scared you know when I woke up I was real sore and it hurt me when I walked . . . but I was scared to say anything about it so I didn't mention it." The next day she told her sister Virginia about it, and Virginia told another sister, Becky. About an hour later the two sisters came over to Deborah's house, "and I told her about what I thought had happened and then Becky went and told mother she thought I ought to go the hospital and be examined. . . . I was sore in my lower private parts and it hurt me to sit down. As soon as I awoke I was hurting, and sore but I didn't say anything about it to anybody. . . . I was sore all the next day. . . . There was some bleeding from my body that night when I came home. . . . I discovered a small amount in my pants and a lot of discharge."

Deborah testified that she had not engaged in sexual intercourse before the incident in Dr. Kincheloe's office.

Mrs. Rebecca Edwards Wheeler corroborated the testimony of her young sister Deborah, saying that after the other sister Virginia told her about talking with Deborah that she then questioned Deborah, who recounted the details of the experience with Dr. Kincheloe. Her testimony fully corroborated Deborah's testimony.

Mr. Robert D. Emerson, Special Agent of the State Bureau of Investigation, said that after his department had been called into the case, he interviewed Mrs. Myrtle Edwards and Deborah Jean Edwards, and that at the time of the interviews, E. L. Norton, another agent of the S.B.I., and a lady were present. In essence, he said that the statements made to him by Mrs. Edwards and her daughter were the same as contained in her testimony before the Board. He also said that he had investigated the reputations of Mrs. Edwards and Deborah and that they were good."

Dr. Leonard S. Woodall (r.p. 46-49) testified that he had examined Miss Edwards on Friday, August 19th, 1966, and found that she had a laceration in the hymenal ring, that she had two sperm in a specimen from her vagina, that she had had intercourse only within the previous two or three days, but not before that time, that he observed a needle puncture of the skin in her antecubtal fossa inside the elbow of the right arm, which is the usual entrance for a hypodermic injection for inducing sleep.

Petitioner personally appeared before respondent Board for the hearing on January 6, 1967, accompanied by his wife and one George Eason, who he presented as a witness in his behalf, but without counsel. Before going into the hearing Dr. Kincheloe acknowledged that he had received a copy of the charges and accusations preferred against him. At that time the following occurred between the petitioner and Dr. Davis, who was then President of the Board, as appears on page 46(b) of the record as follows:

"MR. ANDERSON: Dr. Kincheloe is present and I would suggest the Board ask him if he is represented by counsel.

DR. DAVIS: Do you have counsel with you, Dr. Kincheloe?

DR. KINCHELOE: No, sir, I do not.

DR. DAVID: You don't desire any representation, then?

DR. KINCHELOE: I don't feel it's necessary, no.

MR. ANDERSON: Dr. Kincheloe made some statement with reference to whether or not he desired to remain in the room during the testimony of witnesses or absent himself. I suggest he be given an opportunity to make a statement regarding that subject at this time.

DR. DAVIS: Would you care to—

DR. KINCHELOE: Gentlemen, in brief, what I asked Mr. Anderson and Dr. Combs was to be excused from this, sitting through this story of the prosecution; I have sat through it in court and I

frankly do not care to hear it again; I assume that Bob Anderson will see to it that the story is told as it was told in court, and after you have dispersed with these witnesses, then I will be glad to give you a statement of what actually happened. During the trial we presented no defense, it was not assumed to be necessary; the prosecution presented their story and my version of what actually happened has not been told.

DR. DAVIS: Well, if it is your preference, then we will excuse you from this part of the proceedings.

DR. KINCHELOE: Thank you very much.

(Dr. Kincheloe is excused)."

During the examination of the witnesses, the Board's attorney made an attempt to locate petitioner for the purpose of offering the witnesses to petitioner for cross examination, but petitioner was not to be found in the building in which the hearing was held. Later petitioner returned to the hearing room and was asked if he desired to examine any or all of the witnesses to which he replied "No sir, this has been done in court previously and I am not an attorney, and I don't feel qualified to cross examine the witnesses. . . . I would like simply to present my story and tell exactly what happened." Petitioner was then sworn and said:

"Gentlemen, I would like to have the privilege of telling my story without interruption if it is all right with you, and if you have any questions when I finish, feel free to ask them. Let me preface my remarks by saying that some 3½ years ago I was before the

Board, at which time I was guilty of something I am quite deeply ashamed of, I was certainly in the wrong and the decision of this Board to revoke my license at that time I feel was entirely justified. I certainly bear no ill feeling against this Board. And had I been on the Board at the time myself I feel that my decision in that particular case would have been the same as yours. You had no choice but to do what you did at that time."

Petitioner then proceeded to testify before the Board without interruption to the effect that he was a changed man and was incapable of doing what he was charged to have done to Deborah Edwards. He testified that he gave Deborah Jean Edwards a complete physical examination, including a pelvic examination, while she was unclothed in the back room of his office to which the door was closed but not locked. He denied unseemly touching the patient or making advances to her or even giving her a shot to put her to sleep. Petitioner was permitted without objection to relate what his lawyer and others had told him about Deborah Jean Edwards' reputation, and to make any other statements he desired to make.

The record of the hearing before the Board includes a verbatim transcript in question and answer of the testimony of petitioner. (R. pp. 78-110). This shows that several members of the Board asked petitioner questions concerning his previous trial by the Board to which he had already referred, and he repeatedly said that the Board did the right thing, that he had no criticism of it and that he would have done the same thing had he been a member of the Board and petitioner admitted that he had not been truthful in regard to the previous charge.

He was then asked about his attempted suicide following the present charge and his treatment at Dorothea Dix Hospital, a mental institution at Raleigh where he stayed for 20 days after his attempted suicide. An explanation of this attempt—he testified that he was depressed about all of the charges, that his wife got in a tantrum and said she was going to leave petitioner and he was depressed enough to think she meant it and that he filled himself as full of phenobarbital as he could, more than a lethal dose and the next thing he knew was when he woke up in the Dorothea Dix Hospital with his wife sitting beside him.

Petitioner presented one witness in his own behalf, George Eason, at the hearing before the Board who testified that Deborah Jean Edwards was "back there, I don't know 40-45 minutes . . . I heard the phone ring several times . . . the girl and her mother looked well when they left the office, seemed to be all right". Mr. Eason admitted upon cross examination that he had a long criminal record for various larcenies, breaking and entering; fighting and public drunkeness.

At the conclusion of the hearing before the Board petitioner made the following statement: "I would like to say to you that I hope you have heard my testimony with an open mind and without prejudice for my previous trouble, and I am sure you have. I can only re-emphasize that I am not the same person that I was at the time I was here before this Board before and this thing that happened to me recently I am not guilty of, any facet of it. I think had you heard the testimony as presented at court that you would have seen through the girl as members of the jury did, and as I said, I have a great deal of respect for

the members of this Board and I feel that you have heard me with an open mind and that you will do the right thing. God bless you".

At the hearing in the Superior Court before Judge Thornburg, petitioner was permitted to testify orally concerning his appearance before the Board without counsel. At this time, petitioner testified as follows:

"Why did you not take a lawyer with you?

A. Frankly, I could not afford the service of a lawyer, as I had borrowed . . ."

Q. How had you financed your case in the Superior Court?

A. I had borrowed on the second mortgage on my house and my household furniture, (R. pp. 116-117)

Q. Now Dr. Kincheloe, the record shows there was some conversation between you and the Board as well as Mr. Anderson concerning you being present when various witnesses testified. What was the reason for that conversation?

A. I had requested that I be excused from this proceeding; their testimony had been presented in the trial and I assumed they would go by that transcript. (R. p. 118)

Q. Did you have any money from any source you could have employed an attorney?

A. Frankly, I did not. (R.p. 119)"

On cross examination before Judge Thornburg petitioner testified as follows:

"CROSS EXAMINATION By Mr. Anderson:

Q. Dr. Kincheloe, you understood the nature of the charges that were preferred against you by the Board of Medical Examiners, did you not?

A. Yes sir.

Q. You received the notice of such charges in, sometime in October of 1966, didn't you?

A. That's true, yes sir.

Q. You recall when you were handed the copy of those charges, do you?

A. Yes sir.

Q. And you remember the incident of somebody handing them to you?

A. Yes sir.

Q. And you read them at that time, didn't you?

A. That's true.

Q. And you were in your right mind and in charge of your mental facilities at that time, weren't you?

A. That's true.

Q. You were not under any disability as far as your mental capacity was concerned at that time, were you?

A. No, sir.

Q. Since that time, after you were at your home, you reviewed the charges, did you not?

A. Yes, sir.

Q. And before the hearing in January, 1967, before the Board of Medical Examiners, you had again reviewed the charges, had you not read them?

A. Yes sir.

Q. And at the time you appeared before the Board you acknowledged that you had received the charges?

A. That's true.

Q. And you understood them at that time, did you not?

A. Yes sir.

Q. And you were in your right mind and in charge of your mental facilities at that time?

A. Yes sir.

Q. And you brought with you there some friend or witness?

A. A witness.

Q. A witness to present?

A. Yes sir.

Q. And your wife was with you at that time?

A. Yes sir.

Q. And you recall that in those, in the notice of the charges you would be permitted to appear in person and be represented by counsel?

A. Yes sir.

Q. You understood that?

A. Yes sir.

Q. And at the time you made the statements that are recorded in the record, you understood that?

A. Yes sir.

Q. And you recall that you were asked to stay and hear the witnesses and that you declined to do so?

A. That's true, yes, sir.

Q. And you did not stay in the lobby of the hotel at which the hearing was held all of the morning?

A. I was either there or in the coffee room.

Q. You did not ask to cross examine any of the witnesses?

A. Mr. Anderson, I didn't feel qualified.

MR. CORBETT: I submit the record is going to show that.

COURT: Overruled, go ahead.

Q. Dr. Kincheloe, how old are you?

A. Forty-six.

Q. You were educated in the usual preliminary fashion before your medical college?

A. Yes sir.

Q. You graduated from college before taking your medical course?

A. I did, sir.

Q. And doctor, you had had connection with lawyers before, have you not?

A. Yes sir.

Q. Many times, haven't you; and employed lawyers, haven't you?

A. Not many times.

Q. How many times have you employed lawyers in connection with charges against you either criminal or before the Board of Medical Examiners?

A. Two or three times to my knowledge.

Q. When you were before the Board in 1952 for narcotic addiction, did you have a lawyer there?

A. I don't recall being before the Board in 1952.

Q. In '53?

A. I was not before the Board for that.

Q. When did you surrender your narcotic license?

A. I gave them up voluntarily in 1952.

Q. At that time did you plead guilty to a charge, criminal charge, so you could be admitted to the hospital, U. S. Government Hospital for treatment of narcotic addiction?

MR. CORBETT: I don't think that is competent on what I have offered concerning what took place in Southern Pines.

A. About fifteen years ago I was a narcotic addict, I went to Lexington, Kentucky, voluntarily; I was not forced to go.

Q. Since that time, you employed counsel in connection with charges preferred against you by the

Board in connection with a matter in 1963, did you not?

A. Yes sir.

Q. You had counsel at the hearing before the Board initially, did you not, from Johnston County at that time?

A. Yes sir.

Q. And then, on appeal to the Superior Court or petition for review of the Board's action involving your license following that hearing you had two lawyers as your counsel?

A. Yes sir.

Q. And you were thoroughly familiar with the procedure followed by the Board at that time, weren't you?

A. I assume I was, yes sir.

Q. And you were in consultation with your lawyer concerning legal matters in connection with the findings of the Board at that time, weren't you?

A. That is true, yes sir.

Q. And in connection with matters you referred to in the Superior Court, you were represented by counsel who now appears for you?

A. That's true.

Q. And thereafter your present counsel was available and living in Smithfield, seven miles from your home, was he not?

A. That's true.

Q. And where he's continued living since that time?
A. That's true.

Q. And you went to the hearing in January before the Board driving your Cadillac automobile, didn't you?
A. 1959 Cadillac automobile, yes sir.

Q. You owned property?
A. That was my wife's automobile, yes, sir, wasn't mine.

Q. You owned property?
A. All mortgaged.

Q. And you were living in your home there at Selma titled in your name and—
A. And my wife's.

Q. You and your wife's, right?
A. That's also heavily mortgaged.

Q. And you have made arrangement for compensating your present counsel in this matter?

MR. CORBETT: Objection.

COURT: Sustained.

MR. ANDERSON: No further questions."

Following this hearing in the Superior Court, Judge Thornburg entered an order which appears in the record (p. 27) in which he found facts and made his conclusions of law, from which we quote the following:

"Upon the foregoing findings of fact the court concludes as a matter of law:

(1) That under the provisions of G.S. 90-14 the Board of Medical Examiners of the State of North Carolina had full authority to revoke the license of Franklin Stith Kincheloe, Jr., to practice medicine in the State of North Carolina upon a finding that he had been guilty of unprofessional and dishonorable conduct unworthy of and affecting his profession.

(2) That any defect in notice of hearing before the Board was waived by Dr. Kincheloe through his personal appearance before the Board at its meeting held on January 6, 1967, at the appointed time and place set forth in the notice of charges and accusations.

(3) That any right to be represented by counsel at the hearing held by the Board was knowingly and intelligently waived by Dr. Kincheloe.

(4) That any right to confrontation by witnesses called at the hearing before the Board was knowingly and intelligently waived by Dr. Kincheloe.

(5) That the trial and acquittal by Dr. Kincheloe of criminal charges arising out of the incident referred to in the notice of the charges and accusations is not res judicata and is not a bar against the proceeding before the Board of Medical Examiners of the State of North Carolina.

(6) That there is sufficient competent evidence in the record to support the finding by the Board that Dr. Kincheloe's license to practice medicine in the State of North Carolina should be revoked.

(7) That there is sufficient finding of fact upon which the Board could base its conclusions that Dr. Kincheloe was guilty of unprofessional and dishonorable conduct.

(8) That a review of the record pursuant to the provisions of GS 90-14.10 leads the undersigned court to the inescapable conclusion, however;

A. That Dr. Kincheloe did not receive a fair and impartial hearing by the Board.

B. That incompetent evidence outside the scope of his notice of charges and accusations was heard and most probably considered by the Board in reaching its decision.

C. That the Board at its hearing on this matter did not comply with the mandatory provisions of GS 90-14.6.

IT IS THEREFORE ORDERED that the case be and the same is hereby remanded for hearing de novo before the Board of Medical Examiners of the State of North Carolina in accordance with the provisions of Article 1, Chapter 90 of the General Statutes of the State of North Carolina.

From the foregoing conclusions of law No. 1-7, petitioner appealed to the Supreme Court of North Carolina. From the conclusions set forth in paragraphs 8. (A, B. and C), and from the order remanding the cause to the Board for further hearing, the respondent Board appealed to the Supreme Court of North Carolina.

Upon appeal, the Supreme Court of North Carolina, in a unanimous opinion which is reprinted in its entirety in the Appendix to petitioner's brief, affirmed the findings of Judge Thornburg that the petitioner had knowingly and intelligently waived his right to be represented by counsel in the hearing before respondent Board, saying further: "Even had he not done so, we know of no provision for the appointment at public expense of an attorney for a doctor whose office is so filled with patients that he has to decide whom he will see first."

Concerning the questions asked petitioner by members of the respondent Board, the Supreme Court of North Carolina said:

> "No new evidence was developed and the questions were not of a harsh nature but constituted a repetition of his previous evidence. (pp. A-8, petitioner's appendix)
>
> "An examination of the lengthy record reveals no violation of this statute by the Board or its attorney. It does demonstrate a rather friendly and sorrowful feeling for the respondent, as in most of the questions he was addressed as "Frank'." (p. A-18, petitioner's appendix)

In the North Carolina courts, petitioner complained that he had been interrogated concerning his former appearance before the same Board, his trial upon the charge of rape, and his confinement to a mental institution, all of which subjects he introduced into the hearing by his own statements.

The Supreme Court in its opinion also discussed and considered each and every error assigned by petitioner concerning the admission of evidence and his interrogation by members of the Board, and concluded that the hearing was conducted in full compliance with the rules and the course and practice of the court, after due notice; that the Board's findings were fully sustained by the evidence; and that petitioner's license to practice medicine should be revoked.

ARGUMENT

NO QUESTION ARISING UNDER THE CONSTITUTION OR STATUTES OF THE UNITED STATES IS INVOLVED IN THIS CASE.

This case involves no question arising under the constitution of the United States, as urged by petitioner. The North Carolina Superior Court found as a fact that petitioner had knowingly and intelligently waived his right to be represented by counsel and to confront witnesses at the hearing before the respondent Board and this was affirmed by the Supreme Court. Petitioner based his appeal to the North Carolina Supreme Court upon the contention that he had not intelligently waived his right to counsel at the hearing, conceding that such a right might be waived in such a proceeding in the nature of a civil action.

All other questions involved in the appeal to the North Carolina Supreme Court by respondent Board and petitioner involved alleged errors in the admission of evidence and in the interrogation of petitioner by members of the respondent Board, and whether by reason of such alleged

errors petitioner received a fair and impartial hearing before the Board. All of these contentions and questions were decided against petitioner by a unanimous Supreme Court of North Carolina.

While the main thrust of petitioner's argument here appears to be his lack of counsel at the hearing before the respondent Board, we will respond to all of his miscellaneous contentions set forth throughout his brief concerning alleged errors in the hearing before the respondent Board.

PETITIONER KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHT TO BE REPRESENTED BY COUNSEL AND TO CONFRONT WITNESSES AT THE HEARING BEFORE RESPONDENT BOARD.

The North Carolina Courts found and concluded that petitioner referred to in the Superior Court below as "licensee", and in the Supreme Court as respondent, had knowingly and intelligently waived his right to be represented by counsel and to confront witnesses at the hearing before the Board. Such a right and opportunity was afforded petitioner in accordance with the provisions of the North Carolina statutes regulating the revocation of licenses to practice of medicine.

The finding of the court below that petitioner waived representation by counsel is fully supported by the record and his own testimony, as follows:

The notice of charges and accusations included the following: (R. p. 3)

"You are further given notice that a hearing will be held concerning the above charges and accusations before the Board of Medical Examiners of the State of North Carolina on January 6, 1967 at 2:00 p.m. o'clock at which time you will be permitted to be heard, to cross examine witnesses, and to present evidence on your own behalf, either personally or through counsel." (emphasis supplied)

Petitioner appeared in person at the hearing at the time and place set out in the notice, accompanied by his wife and one George Eason, who testified as petitioner's witness at the hearing. At that time, petitioner acknowledged receipt of a copy of the notice of charges set out in the record (R. p. 46a). Thereafter the following occurred:

"MR. ANDERSON: Dr. Kincheloe is present and I would suggest the Board ask him if he is represented by counsel.

DR. DAVIS: Do you have counsel with you, Dr. Kincheloe?

DR. KINCHELOE: No, sir. I do not.

DR. DAVIS: You don't desire any representation, then?

DR. KINCHELOE: I don't feel it's necessary, no."

In his testimony before the court below, petitioner testified to the following effect:

"That he understood the nature of charges preferred against him, which he reviewed at his home after he received a copy of the charges. (R. p. 119)

That he understood that he would be permitted to be represented by counsel at the hearing before the Board (R. p. 120).

That he had employed lawyers two or three times before in connection with criminal charges or charges before the Board of Medical Examiners, particularly at the hearing before the Board on charges in 1963 and on appeal from the Board to the Superior Court. (R. p. 122).

That he was thoroughly familiar with the procedure followed by the Board at that time. (R. p. 122)

Petitioner is well educated, and had knowledge of and experience with procedures before the Board and in the criminal courts.

Petitioner told the court below that he had not employed counsel to represent him at the hearing before the Board because he could not "afford" to do so. He made no representation to the Board at anytime that he could not afford to employ counsel or that he desired to be represented by counsel. He did indicate to the Board that he had been represented by counsel in the criminal trial on his indictment of raping Deborah Jean Edwards.

The finding and conclusion of the court below that petitioner had waived his right to confront witnesses against him is also fully supported by the record, which shows the following:

That the petitioner understood from the notice of charges that he would be privileged to confront and cross examine witnesses at the hearing before the Board.

That petitioner made the following statement to the Board at the hearing:

> "DR. KINCHELOE: 'Gentlemen, in brief, what I asked Mr. Anderson and Dr. Combs was to be excused from this, sitting through this story of the prosecution; I have sat through it in court and I frankly do not care to hear it again; I assume that Bob Anderson will see to it that the story is told as it was told in court, and after you have dispersed with these witnesses, then I will be glad to give you a statement of what actually happened. During the trial we presented no defense, it was not assumed to be necessary; the prosecution presented their story and my version of what actually happened has not been told." (R. p. 46-b)

That petitioner referred to the "story of the prosecution" indicating that he had observed that Deborah Jean Edwards and her mother and sister, who had testified in the criminal trial, were present at the Board meeting.

With respect to this contention of petitioner, Pless, J., speaking for the Supreme Court of North Carolina, said:

> "It is also implied that some disadvantage resulted to the respondent because he was not represented by counsel at the hearing, saying he could not afford to employ counsel. Also, it must be recalled that he said he didn't think this necessary and that he waived it. Even had he not done so, we know of no provision for the appointment at public expense, of any attorney for a doctor whose office is so filled with patients that he

has to decide whom he will see first. It would strain the credubility of the public to learn that, in these days, there is an indigent doctor!

"No material change in the circumstances of the respondent has been shown, but we note that he is now represented by able (and not court-appointed) counsel."

It is not without significance that petitioner employed able counsel as soon as he was notified of the Board's decision of January 10, 1967, through whom petitioner applied for a stay order on January 27, 1967 (R. p. 7), and has been represented by counsel employed by petitioner since that time. From all of this, it is obvious that petitioner, voluntarily elected not to be represented by counsel at the hearing before the Board, and to rely upon his own ability to presuade and convince the Board, each of whom he knew personally as the result of his several previous appearances before the Board, and being the same individuals who had re-instated his license to practice medicine 18 months previously.

We are not aware of any court decisions applying to civil actions the principles announced by this court as being applicable to representation of a defendant in a trial upon criminal charges. A hearing before the respondent Board of Examiners is in the nature of a civil proceeding. Such proceedings are specifically denominated as "civil actions" in General Statutes 90-14.6, which provides that the Board shall hear evidence in the manner and form as in "civil actions". Also, General Statutes 90-14.11 provides that either party to such a proceeding

before the Board may appeal to the Supreme Court under "rules of procedure applicable to OTHER CIVIL ACTIONS". (Emphasis supplied).

Similar license revocation proceedings are held to be in the nature of civil actions by numerous courts of last resort in their holdings that acquittal of an accused physician upon a criminal charge does not bar proceedings against him before the Board of Medical Examiners, as annotated and discussed in 123 *American Law Reports* at p. 784.

In the Supreme Court of North Carolina, petitioner abandoned his previous contention that his acquittal of the criminal charge of raping Deborah Jean Edwards was a bar to the charges preferred against him by respondent Board. Nevertheless, the North Carolina Court in its opinion included a complete answer to any such contention (p. A-18) in upholding the Superior Court's conclusion that such acquittal was not *res judicata* of the charges herein involved. Such a ruling is fully supported by the numerous decisions cited in the above ALR annotation.

THE OTHER CONTENTIONS OF PETITIONER IN SUPPORT OF HIS PETITION INVOLVE RULINGS OF THE NORTH CAROLINA COURT UPON EVIDENTIARY AND PROCEDURAL MATTERS EXCLUSIVELY WITHIN THE PURVIEW OF THE STATE COURT.

With respect to the general conduct of the hearing before the respondent Board, in the opinion of the North Carolina Supreme Court it is said:

> "Here, a group of eminent doctors of the very highest character and reputation have (and the record shows they did it reluctantly and regretfully) found their associate guilty, upon impressive evidence, of 'lustful, lascivious and unprofessional conduct." The court (below) found that that these findings were supported by the evidence, as was its order that his license to practice medicine be revoked".

The qualification of the members of respondent Board to hear the case has never been questioned by petitioner. The sufficiency of the evidence to support the Board's findings have and were not questioned by petitioner in the Supreme Court of North Carolina.

The opinion of the Supreme Court continues as follows:

"However, the Court also found that Dr. Kincheloe did not receive a fair and impartial hearing in that 'incompetent evidence outside the scope of his notice was heard and most probably considered by the Board.' The finding does not specify this evidence, but upon consideration of the record, we can only construe it as holding improper the questions by the members of the Board regarding the respondent's previous violations, which had resulted in the suspension of his license. This ruling is fallible. (1) The respondent first interjected this feature when he referred to his hearing before the Board three and a half years earlier and said that he was ashamed of the matters then investigated. The admission of incompetent evidence is cured when substantially the same evidence is theretofore or thereafter admitted without objection. 1 Strong, N. C. Index 2d, Appeal and Error, Sec. 48. Thus, if evidence regarding his previous license revocation were incompetent, it had

"theretofore been admitted without objection" in the form of the respondent's voluntary statement. (2) The proceedings show that the previous charges were already known to the members of the Board so that information given in the present investigation added no new knowledge. (3) Examination of a defendant, or respondent, as to past misconduct is competent for the purpose of impeachment and may properly be considered by a jury (or a board) in weighing the value and credibility of his testimony.

"The Doctor was questioned about his previous troubles with the Board, as well as other questionable activities, only after he had referred to them, or it was apparent from the questions that the members of the Board already had knowledge of these activities, and no new material information was thus elicited. While no objection was taken at the time, all of the questions asked were competent and would have been admitted by any court.

"In its judgment, the court found that the prosecution of the respondent upon the charge of rape which resulted in his acquittal was not *res judicata* and was not a bar against these proceedings. This was correct, and yet the learned judge implied that questions regarding that trial were improper. We cannot agree. Other factors must be considered. In a criminal trial, the guilt of a defendant must be shown beyond a reasonable doubt; here only a preponderance of the evidence is required. In the criminal charge, the defendant was alleged to have committed rape —here he was charged with unethical and unprofessional conduct in having sexual relations with his patient—a vast difference. In the criminal prosecution, the penalty upon

conviction is a death sentence or life imprisonment. In these proceedings the maximum punishment is the loss of the respondent's license to practice medicine."

With respect to petitioner's contention that respondent Board did not "admit and hear evidence in the same manner and form as prescribed by law for civil actions", Pless, J., for the Court said:

> "An examination of the lengthy record reveals no violation of this statute by the Board or its attorney. It does demonstrate a rather friendly and sorrowful feeling for the respondent, as in most of the questions he was addressed as "Frank." The only incompetent evidence we find is that the respondent was permitted to violate the hearsay evidence rule and testify to the alleged immoral conduct of Deborah, which he claims was related to him by three different boys."
>
> "In full and complete hearings, of which the respondent had notice, evidence has been submitted to the Board which fully sustains its findings and order as set out in the statement of facts. No reason appears to question the motives and veracity of Deborah Jean Edwards. If, for any reason, she were making a false charge against the doctor, she could have testified that while in a semi-conscious condition and unable to protect herself, the respondent had sexual relations with her. The fact that she did not so testify but that this was discovered only after she had spoken of her soreness to her sisters, followed by the examination by Dr. Woodall, gives credence to the charges. Upon all of the evidence, including that of the respondent, Deborah was in his office for a sufficient length of time

> for the incident to occur as found by the Board. Deborah's testimony is corroborated in many details by the testimony of her mother, her sister, Mr. Anderson of the S.B.I., and Dr. Woodall. In opposition to this, we have only the denial of the respondent and rather vague substantiation of part of his statement by the witness Eason."

Petitioner's contention that he was incapable of answering the charges because of mental illness at the time of the hearing before respondent Board (Petitioner's brief, p. 7) is wholly without merit. Petitioner's counsel raised and made no such contention in either of the North Carolina courts. On the contrary, petitioner has at all times contended he was mentally competent not only to testify, but to practice medicine, at anytime. In fact, petitioner testified in the Superior Court (R. pp.119-121) that he had read the charges against him many times and fully understood them and the notice of hearing, that he was under no mental disability at the time he was served with such charges or at the hearing, that he understood that he would be permitted to be represented by counsel at such hearing, and that he made and understood the statements made by him at such hearing. The Superior Court found as a fact that petitioner "knowingly and intelligently" in his personal appearance waived any defect in service of notice of charges, his right to be represented by counsel and to be confronted with witnesses at such hearing. (R. p. 34), which findings were affirmed by the Supreme Court of North Carolina. At the hearing before respondent, Petitioner intelligently testified and made his plea to the Board, and even explained that his confinement to a mental institution occurred while he was unconscious from an

intentional and self-administered overdose of barbiturate drugs, in sudden depression, rather than for a specific mental illness.

Petitioner also stated that he had requested his attending physician at the State Hospital to send the Board a report of his diagnosis of petitioner's mental condition.

ERRORS IN PETITIONER'S BRIEF

Petitioner's brief in support of his petition contains several inadvertent errors to which we should call attention, as follows:

On page 6, appears the statement, "No transcript of the foregoing cross-examination (of petitioner before the Board) is contained in the record". On the contrary, a full transcript of petitioner's entire testimony before the respondent Board is set forth in pages 78-107 of the record in the Supreme Court of North Carolina, a copy of which has been filed with this court.

On pages 10 and 11 of petitioner's brief appear misquotations of several assignments of error made by the respondent Board in its appeal to the Supreme Court of North Carolina. From petitioner's brief, and his statement that he "concurs in the foregoing Exceptions of the Board numbered 7, 8, 9 and 10" it would appear that respondent had contended that the Board of Examiners agreed that it had committed error in its hearing, which is not correct. On the contrary, the Exceptions and Assignments of Error of the Board 7, 8, 9 and 10 are "for that the court (Superior Court) included in its conclusions of law the

"finding" that Dr. Kincheloe did not receive a fair and impartial hearing", "that incompetent evidence was heard", etc.

CONCLUSION

It is therefore respectfully submitted that Petitioner's license to practice medicine was properly revoked by the Board of Medical Examiners of the State of North Carolina upon plenary competent evidence, after due notice and hearing, and after affording petitioner an opportunity to be represented by counsel and to cross examine witnesses at the hearing before the Board, which he knowingly and intelligently waived, all in accordance with the General Statutes of North Carolina regulating the practice of medicine; that no question involving the denial of due process of law or other federal question is presented by Petitioner warranting a review of the decision of the Supreme Court of North Carolina; and no grounds exist for the issuance of a writ of certiorari in this case.

Respectfully submitted,

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